STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2013
v	No. 312316 Bay Circuit Court
JEFFREY ALLEN JULIAN, Defendant-Appellant.	LC No. 10-010985-FC

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial convictions on one count of first-degree murder, MCL 750.316, and one count of moving or carrying away a dead body, MCL 750.160. For the reasons outlined below, we affirm.

On August 27, 2010, defendant contacted the Bay City Police Department to report that his girlfriend was missing. He subsequently told Dustin Pirl that he had killed her. At the request of the police, Pirl agreed to wear a recording device and record a conversation with defendant. During the conversation, defendant again confessed.

I. MOTION TO SUPPRESS

Defendant first argues that the trial court erred by denying his motion to suppress the statements to Pirl and the recording. Specifically, defendant maintains that, instead of using Pirl to record the conversation with defendant, the police should have invited defendant to come to the police station for questioning. According to defendant, not doing so "was tantamount to a custodial interrogation" and necessitated *Miranda*[1] warnings. We disagree. We review a trial court's findings of fact regarding a motion to suppress evidence for clear error and the ultimate decision de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

Defendant's position is entirely without merit. First, defendant offers no authority for his position that criminal suspects have a constitutional right to be asked to come to the police

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

station for questioning, and we have located no such authority. This is not surprising since there is no such right. Second, defendant's *Miranda* rights were not violated, let alone implicated, because his recorded conversation with Pirl was not the equivalent of a custodial interrogation.

"It is well settled that *Miranda* warnings need only be given when a person is subject to custodial interrogation." *People v Jones*, 301 Mich App 566, 580; 837 NW2d 7 (2013). "Whether a defendant is in custody for purposes of *Miranda* at the time of an interrogation is determined by looking at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he or she was free to leave." *Id.*; see also *Miranda*, 384 US at 444 ("[C]ustodial interrogation [is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.")

Here, it is undisputed that the recorded conversation occurred when defendant voluntarily went to Pirl's home and freely confessed to the killing. There simply is no evidence that defendant was ever taken into custody or otherwise deprived of his freedom at any time during this visit. The fact that Pirl may have been acting as an agent of the police has no bearing on whether defendant was deprived of any freedom. See *Illinois v Perkins*, 496 US 292, 294-296; 110 S Ct 2394; 110 L E2d 243 (1990); *People v Fox (After Remand)*, 232 Mich App 541; 591 NW2d 384 (1998). Therefore, the trial court did not err by denying defendant's motion to suppress the recording.

II. ADDITIONAL EXPERT EVALUATION

Next, defendant argues that the trial court erred by determining that he was not entitled to a second independent psychiatric evaluation. Further, he asserts that he was deprived of his right to present a defense in violation of the Sixth Amendment's Compulsory Process and Confrontation Clauses and the Fifth Amendment's Due Process Clause, as well as the Michigan Constitution. We disagree. We review questions of statutory interpretation de novo. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Moreover, whether defendant's constitutional right to present a defense was violated is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Defendant filed a notice of insanity defense as required under MCL 768.20a(1) and subsequently underwent a psychiatric examination pursuant to MCL 768.20a(2). He then obtained an expert witness to conduct the independent evaluation allowed under MCL 768.20a(3). Defendant's subsequent request for a second independent evaluation by an expert who had expertise with respect to some of defendant's alleged specific conditions, including post-traumatic stress disorder, was denied.

In *People v Kowalski*, 492 Mich 106, 138-139; 821 NW2d 14 (2012), the Court stated:

> Criminal defendants have a constitutional right to "a meaningful opportunity to present a complete defense." The Sixth Amendment of the United States Constitution provides that a criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." This right has been incorporated to the states through the Fourteenth Amendment. The Supreme

> Court of the United States has held: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . ."
>
> The right to present a defense limits the otherwise broad latitude of states to establish rules that exclude evidence from criminal trials. When rules "infring[e] upon a weighty interest of the accused" and are "arbitrary" or "disproportionate to the purposes they are designed to serve," they must yield to the constitutional right. However, while the right to present a defense is a fundamental part of due process, "it is not an absolute right," and "[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" [Citations omitted.]

In *People v Leonard*, 224 Mich App 569, 580-581; 569 NW2d 663 (1997), this Court noted:

> Indigent defendants . . . need not be provided with *all* the assistance that wealthier defendants might buy, but fundamental fairness requires that the state not deny them "an adequate opportunity to present their claims fairly within the adversary system."
>
> In *Ake* [*v Oklahoma*, 470 US 68, 83; 105 S Ct 1087; 84 L Ed 2d 53 (1985)], a case involving an insanity claim, the Supreme Court concluded that the Due Process Clause guarantee of fundamental fairness is implicated "when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial[; at that point] the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

There is no authority for the proposition that a defendant is constitutionally entitled to an expert with specific expertise. Although another psychiatrist or psychologist might have had additional expertise, defendant has not established that the appointed expert was not competent. Accordingly, he has not established a constitutional violation.

Further, defendant's claim that his right to present a defense was impaired is refuted by the record. He was permitted to obtain the evaluation by a clinician of his choice, and he has presented no legal or factual basis for concluding that the clinician who provided the first evaluation was incompetent to render analysis or otherwise unsuitable in any way that would necessitate the procurement of a second evaluation. We note that defendant's position at the trial court made it clear that his request for a second expert was based on sheer speculation. Defendant claimed that the United States military possessed some medical records that he was attempting to obtain. Defendant speculated that *if* he received those records, those records *could* reflect post-traumatic stress disorder, and another expert *may* be better suited to evaluate defendant. Thus, with defendant's request for another examination being based on speculation, he cannot establish a factual basis that he was denied his right to present a defense.

The procedure that a defendant must follow before raising the defense of legal insanity is outlined in MCL 768.20a. That statute reads, in relevant part, as follows:

> (3) The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant is entitled to receive a reasonable fee as approved by the court.

The trial court's denial of a second independent psychiatric evaluation was supported by the plain language of MCL 768.20a(3), which states that a defendant may secure "an independent psychiatric evaluation" on the issue of insanity. Although "an" is an indefinite article and reflects a "generalizing force," see *Barrow v City of Detroit Election Comm'n*, 301 Mich App 404, 414; 836 NW2d 498 (2013) (noting that when the Legislature wants to refer to a *particular* item, it uses a definite article rather than an indefinite article), the context of the sentence nonetheless makes it clear that the Legislature contemplated only a single evaluation. The fact that the Legislature referred to the evaluation with an indefinite article to reflect this "generalizing force" is not surprising since, in the context of the statute, the evaluation was merely *prospective*; thus, referring to it with any type of specificity would have been dubious. If the Legislature had contemplated allowing multiple evaluations, it would have stated so by using the plural word "evaluations" instead of the singular "evaluation."[2] Instead, the fact that a defendant may secure "an independent psychiatric evaluation" directs us to the conclusion that only a single evaluation was intended.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was denied the effective assistance of counsel at trial. We disagree. Because this Court denied defendant's motion to remand for an evidentiary hearing, our review of this issue is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012) (quotation marks omitted).

Under both federal and state constitutional law, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms and that there is a reasonable probability

[2] For example, the statute could have been written, "The defendant may, at his or her own expense, secure independent psychiatric evaluations . . . ."

that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant alleges two errors on the part of his trial counsel. First, defendant alleges that trial counsel was ineffective for scheduling an independent psychological evaluation without first obtaining all of defendant's relevant medical records. Even assuming arguendo that this decision fell below professional norms, defendant has not established that counsel's error was outcome determinative. Though the evaluating clinician did not possess all of defendant's medical records at the time of the evaluation, the trial court explicitly permitted defendant to provide any such records to the clinician and also permitted the clinician to revise his evaluation if necessary. Given those facts, any error was rendered harmless.

Second, defendant asserts that trial counsel erred by failing to discover and investigate defendant's history of head trauma and marijuana abuse. These histories, however, are evidenced on appeal by nothing more than an affidavit by defendant's appellate counsel stating that defendant told her about such histories. There is nothing on the record to support these assertions. Therefore, defendant has waived the issue. *Lockett*, 295 Mich App at 186. Likewise, there is nothing in the record to support a conclusion that any alleged error was outcome determinative; defendant merely asserts that following up on his alleged conditions would have made his insanity defense successful. Even if the conditions had been properly established, defendant has provided nothing to suggest that a clinician would have found these clinically significant to defendant's insanity defense. Given this lack of evidence, defendant cannot establish a claim for ineffective assistance of counsel.

Defendant also argues that he was denied the effective assistance of counsel by the trial court's decision to prohibit defendant from obtaining a second independent evaluation. This argument is also without merit.

Even when trial counsel's performance is not deficient, government action can deprive a defendant of the effective assistance of counsel if the state prevents counsel from rendering assistance. *People v Mitchell*, 454 Mich 145, 154; 560 NW2d 600 (1997). Here, however, the trial court permitted defendant to obtain an independent evaluation from a clinician of his choice and also permitted defendant to present that clinician with any additional medical records that might cause the clinician to revise his opinion. Given these facts, the trial court did nothing to prevent defense counsel from rendering effective assistance to defendant.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause